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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIJAH KEVIN RODRIGUEZ,

Defendant and Appellant.

G047651

(Super. Ct. No. 10NF3521)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
William R. Froeberg, Judge. Affirmed.

Correen Ferrentino, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland,  
Stacy Tyler and Kimberly Donohue, Deputy Attorneys General, for Plaintiff and  
Respondent.

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## INTRODUCTION

Defendant Elijah Kevin Rodriguez was convicted of aggravated assault and street terrorism. A jury found true the sentencing enhancement allegation that the assault was committed for the benefit of, at the direction of, or in association with a criminal street gang. On appeal, defendant claims there was not sufficient evidence to support the true finding on the gang enhancement allegation because the testimony of the prosecution's gang expert witness was conclusory. We disagree. The prosecution's gang expert fully testified regarding the basis for his opinion that the gang's primary activities included committing felony assault and felony vandalism.

Defendant argues the trial court erred in instructing the jury that the prosecution was required to prove the gang's primary activities included "felony assaults and vandalism" because the jury might have based its verdict on the gang's commission of misdemeanor vandalism, which is insufficient under Penal Code section 186.22. We initially conclude defendant forfeited this issue by failing to object to the instruction or to request a modification in the trial court. Even if we were to reach the issue, however, we would conclude there was no error.

Therefore, we affirm the judgment.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 9:45 p.m. on October 22, 2010, Anthony Cendejas, while walking through an alley, was accosted by four young men. The men asked Cendejas where he was from, and yelled, "Cam" and "C.M.P." They then hit and stabbed Cendejas, and stole his Razor scooter. After the attack, the men moved their arms around and made signs with their hands. Cendejas received sutures for his wound at a local hospital, and was released the next day.

The police officers responding to the incident went to a nearby apartment where a member of the Campo criminal street gang was known to live. Before entering the apartment, the officers listened to the conversation going on inside, and heard someone say, “yeah, we got that—that booger.” Another person inside asked, “are you sure it was a Moco?” The original speaker responded, “yeah, he was a booger for sure.” “Moco” and “booger” are derogatory terms for members of the Monos criminal street gang, which are used by rivals of that gang. Cendejas was a former member of the Monos street gang; Monos is a rival of the Campo street gang.

When the officers entered the apartment, they found defendant, five other men, and three women. A folding pocketknife was on the floor, under the couch on which defendant was sitting. When asked later about the knife, he replied it “wasn’t even the knife.” Defendant was wearing a white T-shirt with red splatter stains. He denied that the stains were blood, claiming they were actually spilled soup. Testing by the Orange County crime lab revealed that the stains were defendant’s own blood. A Razor scooter was found in the apartment.

Michael Duarte, who was in the apartment with defendant, told the police that defendant and two other men, all of whom were members or associates of the Campo street gang, assaulted Cendejas and stole his scooter. Duarte said defendant talked about the attack afterwards. At trial, most witnesses, including Duarte and Cendejas, either recanted their statements to the police, or claimed they could not remember what had happened or what they had said.

La Habra Police Detective Timothy Shea testified as a gang expert for the prosecution. Shea testified he was familiar with the Campo street gang, and had personally investigated crimes committed by its members, reviewed court documents relating to its crimes, reviewed police reports, and interviewed members of the gang and victims of the gang’s crimes. Members of the Campo gang abbreviate their name as C.M.P., and form hand signs with those letters to promote the gang. Shea testified that as

of October 22, 2010, Campo was an ongoing organization with about 50 members, whose primary activities included felony assault and felony vandalism. Shea also opined that defendant was an active member of the Campo criminal street gang as of October 22, 2010. Shea testified to two predicate crimes as support for his opinion that Campo gang members had engaged in a pattern of criminal activity. The first was a robbery committed on October 14, 2010, by a person who, Shea opined, was an active participant in the Campo street gang on the date of the crime. The second was shooting at an occupied motor vehicle on October 29, 2009, by another person who, Shea opined, was an active member of the Campo gang on that date.

Defendant was charged in an information with aggravated assault (Pen. Code, § 245, subd. (a)(1)) and street terrorism (*id.*, § 186.22, subd. (a)). The information alleged as sentencing enhancements that defendant committed the assault for the benefit of, at the direction of, or in association with a criminal street gang (*id.*, § 186.22, subd. (b)(1)), and that defendant committed the crimes while he was on release from custody in two other felony cases (*id.*, § 12022.1, subd. (b)).

A jury found defendant guilty of both crimes, and found the gang sentencing enhancement to be true. In a bifurcated proceeding, the trial court found one of the Penal Code section 12022.1, subdivision (b) allegations true. The court sentenced defendant to a total prison term of nine years: the upper term of four years for the aggravated assault count, plus a consecutive term of three years for the gang enhancement, plus a consecutive term of two years for the Penal Code section 12022.1, subdivision (b) enhancement. The trial court stayed execution of defendant's sentence on the street terrorism count, pursuant to Penal Code section 654. Defendant timely appealed.

## DISCUSSION

### I.

#### *WAS THERE SUFFICIENT EVIDENCE THAT CAMPO IS A CRIMINAL STREET GANG TO SUPPORT THE JURY'S FINDING ON THE GANG ENHANCEMENT ALLEGATION?*

Defendant argues there was insufficient evidence of the Campo gang's primary activities and pattern of criminal activity. Therefore, he argues, there was insufficient evidence that Campo was a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b). "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "upon no hypothesis whatever is there sufficient substantial evidence to support" the jury's finding. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Shea testified that, in his opinion, "[s]ome of the primary activities by this gang were felony assaults and felony vandalisms." Shea's opinion was arrived at "[b]y reviewing previous gang crimes, reviewing their court records of the crimes that were committed by members of the Campo criminal street gang," as well as conversations with other gang detectives, residents, and crime victims, and the facts of the current case. Shea also testified as to specific instances of assaults committed by members of the Campo gang. Shea testified that he had personally observed examples of felony vandalism committed by the Campo gang, which "occur daily."

In his opening brief, defendant contends that the trial court sustained an objection to Shea's testimony regarding the Campo gang's primary activities. That is not correct. When the deputy district attorney asked Shea for his opinion as to the Campo

gang's primary activities, defense counsel objected on the grounds of speculation and lack of foundation. The court overruled the objection. Shea then responded: "Some of the primary activities by this gang were felony assaults and felony vandalisms. Off the top of my head I can name three of 'em in 2000 and 10, the Bulandr—" at which point, defense counsel objected on the grounds the answer was nonresponsive; the court sustained that objection. There was no motion to strike. It is obvious that the objectionable testimony was Shea's attempt to provide specific information regarding the Campo gang's crimes, not his identification of the gang's primary activities.

Defendant argues Shea's testimony was not sufficient to establish the Campo gang's primary activities, or that the Campo gang had engaged in a pattern of criminal activity. Defendant relies primarily on *In re Alexander L.* (2007) 149 Cal.App.4th 605, in which the court concluded the conclusory testimony of a gang expert as to a gang's alleged primary activities was insufficient. In that case, the gang expert's entire testimony as to the gang's primary activities was as follows: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations." (*Id.* at p. 611.) Notably, in *In re Alexander L.*, a panel of this court compared the expert's testimony unfavorably to *People v. Gardeley* (1996) 14 Cal.4th 605, 620, in which the gang expert based his opinion about the gang's primary activities "on conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies." (*In re Alexander L., supra*, at p. 613.)

Here, Shea's opinion as to the Campo gang's primary activities has the same evidentiary background and support as did the expert's opinion in *People v. Gardeley*. Contrary to defendant's unsupported claims on appeal, Shea was not required to testify to the specific circumstances of any act of vandalism, or to testify to the amount

of damage caused thereby. Defendant also argues that the evidence was insufficient because Shea did not provide the specifics of his conversations with other gang detectives regarding the Campo gang, which conversations were part of the basis of his opinions. We find no authority supporting this argument.

We therefore conclude there was sufficient evidence of the Campo gang's primary activities and pattern of criminal activity in this case, and affirm the true finding on the gang enhancement allegation.

## II.

*DID CALCRIM NO. 1400 FAIL TO INSTRUCT THE JURY THAT VANDALISM  
MUST BE A FELONY TO BE A PRIMARY ACTIVITY OF A GANG FOR PURPOSES OF  
PENAL CODE SECTION 186.22, SUBDIVISION (f)?*

A criminal street gang is defined by statute as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

(Pen. Code, § 186.22, subd. (f).) One of the criminal acts that qualifies as a primary activity of a criminal street gang is felony vandalism. (*Id.*, § 186.22, subd. (e)(20).)

Defendant argues that an alleged error in the jury instructions permitted the jury to find that the Campo gang was a criminal street gang based on its commission of misdemeanor vandalism. Therefore, he argues, the true finding on the gang enhancement allegation must be reversed. The trial court instructed the jury with CALCRIM No. 1400, which read, in relevant part, as follows: “A criminal street gang is any ongoing organization, association or group of three or more persons, whether formal or informal: [¶] One, that has a common name or common identifying sign or symbol. [¶] Two, that has, as one or

more of its primary activities, the commission of *felony assaults and vandalism*. [¶]  
Three, whose members . . . whether acting alone or together, engage in or have engaged  
in a pattern of criminal gang activity.” (Italics added.)

The Attorney General argues that defendant forfeited this issue. Defendant did not object to CALCRIM No. 1400 as it was read to the jury, and did not ask that the instruction be clarified to read “felony assaults and felony vandalism.” A defendant may not complain on appeal that an instruction was ambiguous or incomplete if the instruction correctly stated the law, and the defendant did not object. (*People v. Souza* (2012) 54 Cal.4th 90, 118.) We conclude the issue has been forfeited.

Even if we were to reach the issue, we would conclude there was no error. A reasonable interpretation of CALCRIM No. 1400, as read to the jury in this case, is that the term “felony” applies to both the crimes of assault and vandalism. Shea testified specifically that as of October 22, 2010, “[s]ome of the primary activities by this gang were felony assaults *and felony vandalisms*.” (Italics added.) Shea also testified, regarding the Campo gang’s primary activities: “*There are felony vandalisms*. They occur daily. I see them on my patrols throughout the city, as well as I see them when driving through the city not on patrol. I constantly see . . . new and fresh vandalisms tagged up throughout the city.” (Italics added.) No evidence was offered regarding misdemeanor vandalism.

Further, as explained *ante*, there was substantial evidence to support a finding that one of the Campo gang’s primary activities was the commission of felony assaults, based on the testimony of Shea. No objection was raised regarding the reference to felony assaults in CALCRIM No. 1400.

DISPOSITION

The judgment is affirmed.

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FYBEL, J.

WE CONCUR:

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O'LEARY, P. J.

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IKOLA, J.